UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CENTER FOR INDIVIDUAL FREEDOM, INC.,)))
Plaintiff,)
v.) Case No. 1:08-00190
NATALIE E. TENNANT, et al.,))
Defendants.))

RESPONSE OF THE CENTER FOR INDIVIDUAL FREEDOM TO THE STATE DEFENDANTS' MOTION TO FILE NEW EXHIBIT TO THEIR "MOTION" TO DISMISS AS MOOT

The State Defendants have filed a "Resolution" of the State Election Commission ("Commission") without offering any explanation of its significance except their acknowledgement (¶ 5) that "all parties hereto maintain that a 'promise not to enforce' is irrelevant."

The State Defendants do not identify any statute or regulation providing for such a Resolution or specifying its effect. They make no claim that the Resolution is legally binding, at this moment or in the future.

The Resolution provides no rationale and does not pretend that it is mandated by some external legal authority. To the contrary, the Resolution says it reflects "an inquiry . . . as to whether this Commission intends to investigate or enforce" – i.e., that it merely reflects present intent. The State Defendants do not assert, much less show, that the Resolution would provide a defense if, tomorrow, the Commission (with current or new personnel) were to commence an investigation or enforcement of the repealed or amended laws. Moreover, the Resolution does

not state that the Commission will refrain from reporting alleged violations to the local prosecuting attorney with jurisdiction over a particular matter.

Finally, the Resolution is limited to "those provisions . . . that have been repealed, deleted, or effectively repealed by the passage of House Bill 4647." It does not address other provisions, such as the definition of "political purposes" in W. Va. Code § 3-8-1a(25) (2008), that the Center for Individual Freedom ("Center") has challenged and that are relied upon in the still-pending Complaint against it by Attorney General McGraw. *Compare* Compl. ¶¶ 15(a), 19 (Dkt. No. 1) (challenging, *inter alia*, the "supporting or opposing" language of the term "political purposes") *with* Ex. A at 1 (citing the definition of "political purposes" in alleging that the Center's ads were "political in nature" and subject to regulation).

In sum, the Resolution provides no basis for a claim of mootness, but merely confirms that an injunction protecting the Center from enforcement against its prior speech will not impair the interests of the state defendants.

July 1, 2010

Respectfully submitted,

ROBINSON & MCELWEE PLLC

/s/ William C. Porth
William C. Porth
West Virginia State Bar Id. No. 2943
400 Fifth Third Center
700 Virginia St., East
P.O. Box 1791
Charleston, WV 25301
(304) 344-5800

Jan Witold Baran Thomas W. Kirby WILEY REIN LLP 1776 K Street, NW Washington, DC 20006 (202) 719-7000

Attorneys for Plaintiff Center for Individual Freedom

CERTIFICATE OF SERVICE

I certify that on July 1, 2010, I electronically filed the foregoing "RESPONSE OF THE CENTER FOR INDIVIDUAL FREEDOM TO THE STATE DEFENDANTS' MOTION TO FILE NEW EXHIBIT TO THEIR "MOTION" TO DISMISS AS MOOT" using the CM/ECF system, which will notify the following CM/ECF participants:

Thomas W. Smith
Silas B. Taylor
MANAGING DEPUTY
ATTORNEYS GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, W. Va. 25305

Anthony Majestro
J.C. Powell
POWELL & MAJESTRO, P.L.L.C.
405 Capitol Street, Suite P-1200
Charleston, W. Va. 2530l

Joseph Jenkins Judith Thomas Nicholas Preservati PRESERVATI LAW OFFICES Post Office Box 1431 Charleston, W. Va. 25325

Patrick Maroney MARONEY, WILLIAMS, WEAVER & PANCAKE 608 Virginia Street, East Charleston, W. Va. 25301 Kathy Brown Teresa Toriseva

WEXLER, TORISEVA & WALLACE

1446 National Road Wheeling, W. Va. 26003

Shirley J. Stanton STANTON LAW FIRM Post Office Box 968 Fairmont, W. Va. 26555 Telephone: (304) 367-0219 Local Counsel for Plaintiffs

James Bopp, Jr.
Randy Elf
Kaylan Lytle Phillips
Joseph A. Vanderhulst
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Ind. 47803

Stephen Pershing
CENTER FOR CONSTITUTIONAL LITIGATION
Suite 520
777 6th Street, N. W.
Washington, D. C. 20001

I also certify that I have mailed the document by United States Postal Service to the following non-CM/ECF participant:

Robbin Stewart Post Office Box 29164 Cumberland, Ind. 46229

/s. W. Bradley Sorrells
W. Bradley Sorrells
ROBINSON & MCELWEE PLLC